ANG CHAI SENG

v.

PP

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
AHMAD FAIRUZ JCA
HAIDAR MOHD NOOR JCA
[CRIMINAL APPEAL NO: J-05-65-98]
9 DECEMBER 1999

CRIMINAL PROCEDURE: *Sentence - Adequacy - Possession of dangerous drugs - Possession of 81.4 grammes of morphine - Sentenced to 18 years' imprisonment and 10 strokes of the rotan - Whether manifestly excessive - Dangerous Drugs Act 1952, ss. 12(2), 39A(2)*

The appellant had pleaded guilty to a charge under s. 12(2) of the Dangerous Drugs Act 1952 ('the Act') for having in his possession 81.4 grammes of morphine. Upon conviction, the High Court sentenced the appellant to 18 years' imprisonment and 10 strokes of the rotan under s. 39A(2) of the Act. The appellant argued that the sentence passed was manifestly excessive and appealed against same to the Court of Appeal.

Held:
Per Haidar Mohd Noor JCA

[1] Under s. 39A(2) of the Act, the punishment prescribed is imprisonment for life or for a term which shall not be less than 5 years and shall also be punished with whipping of not less than 10 strokes. In so far as the punishment on the strokes is concerned, the appellant got the minimum strokes and this court would therefore only consider whether the sentence of 18 years' imprisonment was manifestly excessive.

[2] The learned judge had applied the right principles in the assessment of the sentence and had correctly exercised his discretion. The amount of the dangerous drugs exceeds 15 times the minimum weight of 5 grammes provided under s. 39A(2). Clearly, the appellant had committed a serious offence and the mitigating factors far outweighed in favour of the public interest. The sentence may appear excessive in view of the maximum sentence of 20 years' imprisonment prescribed by the Act, but not manifestly excessive having regard to public interest and the seriousness of the offence.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu telah mengaku salah terhadap tuduhan di bawah s. 12(2) Akta Dadah Berbahaya 1952 ('Akta') kerana memiliki 81.4 gram morphin. Setelah mensabitkan perayu, Mahkamah Tinggi menjatuhkan hukuman 18 tahun penjara dan sebatan sebanyak 10 kali terhadap perayu. Perayu berhujah bahawa hukuman yang dikenakan ke atasnya adalah terlalu berat dan dengan itu merayu kepada Mahkamah Rayuan.

Diputuskan:
Oleh Haidar Mohd Noor HMR

[1] Di bawah s. 39A(2) Akta, hukuman yang ditetapkan ialah hukuman penjara seumur hidup atau pemenjaraan yang tidak kurang dari 5 tahun dan hendaklah juga dihukum dengan tidak kurang dari 10 sebatan. Perayu telah dikenakan hukuman sebatan yang minima dan dengan itu mahkamah ini akan hanya menimbang samada hukuman 18 tahun penjara adalah terlampau berat.

[2] Hakim bijaksana telah melaksanakan prinsip yang betul dalam menilai hukuman dan telah juga melaksanakan budibicaranya dengan betul. Jumlah dadah berbahaya melebihi 15 kali ganda jumlah minima 5 gram seperti yang diperuntukkan di bawah s. 39A(2). Jelas, perayu telah melakukan kesalahan yang serius dan faktor-faktor keringanan ditenggelami oleh faktor-faktor yang menyebelahi kepentingan awam. Hukuman mungkin kelihatan berat mengambilkira hukuman maksima 20 tahun penjara seperti yang diperuntukkan oleh Akta, tetapi tidaklah terlampau berat jika diambilkira kepentingan awam dan keseriusan kesalahan.

[Rayuan ditolak.]

Case(s) referred to:
Bhandulananda Jayatilake v. PP [1982] 1 MLJ 83 ***(refd)***
Loo Choon Fatt v. PP [1976] 2 MLJ 257 ***(refd)***
PP v. Yeoh Eng Khuan [1976] 1 MLJ 239 ***(refd)***
Rex v. Kenneth John Ball 35 Cr App R 164 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 12(2), 39A(2)(c), 39B(1)(a), 39B(2)

For the appellant - Gooi Soon Seng; M/s Gooi & Azura
For the Public Prosecutor - A Rashid Daud DPP

[Appeal from High Court, Johor Bahru; Criminal Case No: PJ45-20-97]

Reported by WA Sharif

JUDGMENT

Haidar Mohd Noor JCA:

The appellant was originally charged for trafficking of dangerous drugs, to wit, 81.4 grammes of monoacetylmorphine, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act") and punishable under s. 39B(2) of the Act. The only penalty prescribed by the Act is death. However, at the close of the prosecution case, the learned judge amended the charge to one of possession under s. 12(2) and punishable under s. 39A(2) of the Act. The appellant pleaded guilty to the amended charge and he was sentenced to 18 years' imprisonment from the date of his arrest, that is, 4 January 1997 and 10 strokes.

This appeal is in respect of the sentence only.

Under s. 39A(2) of the Act, the punishment is imprisonment for life or for a term which shall not be less than five years and shall also be punished with whipping of not less than ten strokes. In so far as the punishment on the strokes is concerned, the appellant got the minimum strokes and we would therefore only consider whether the sentence of 18 years' imprisonment was manifestly excessive so as to warrant our interference.

The power of sentencing is a discretionary one and it has been a firmly established principle that an appellate court would be slow to disturb the sentence imposed by the lower courts unless the sentence is excessive to such an extent as to satisfy this court that when it was passed there was a failure to apply the right principles then this court will intervene (*Rex v. Kenneth John Ball* 35 Cr. App. R 164). According to Hashim Yeop Sani J (as he then was) in *Loo Choon Fatt v. Public Prosecutor* [1976] 2 MLJ at p. 257. "It is a firmly established practice that the court will not alter a sentence merely because it might have passed a different sentence".

The learned judge in his grounds of judgment applied the correct principle in the assessment of the sentence (see pp. 125-127 of the appeal record). He was of the view that an offence under the Act is a serious offence and went on further to say that the amount of dangerous drugs in this case exceeds 15 times the minumum weight of five grammes as provided under s. 39A(2)(c) of the Act. We agree that the appellant committed a serious offence and the mitigating factors far outweighed in favour of the public interest. The sentence imposed may appear to be excessive having regard to the maximum sentence of 20 years' imprisonment prescribed by the Act but in our view the sentence, having regard to the seriousness of the offence of dangerous drugs and the public interest as opposed to the appellant's interest, is not manifestly excessive to warrant our intervention.

It has to be noted that the legislature had thought it fit to increase the punishment for offences under s. 39A(2) of the Act from a maximum of 14 years' imprisonment to life imprisonment and the minimum term of imprisonment from three years to five years and the minimum strokes increased from six to ten strokes. The legislative exercise therefore denotes the government's concern of the problem of drug abuse in this country "the degenerating effect of the misuse of dangerous drugs and the attendant dangers it has posed to society itself" per Hashim Yeop Sani, J (as he then was) in *Public Prosecutor v. Loo Choon Fatt, supra*. Unless the courts take a firm stand in such offences the whole purpose of the legislature in increasing the punishment under s. 39A(2) of the Act would be lost (*Public Prosecutor v. Yeoh Eng Khuan* [1976] 1 MLJ 239).

We would reiterate what the Federal Court said in *Bhandulananda Jayatilake v. Public Prosecutor* [1982] 1 MLJ 83:

> ... this court has said it again and again that it will not normally interfere with sentences, and the probability or even the possibility, that another court would have imposed a different sentence is not sufficient, *per se,* to warrant this court's interference.
>
> For a discretionary judgment of this kind to be reversed by this court, it must be shown to our satisfaction that the learned judge was embarking on some unauthorised or extraneous or irrelevant exercise of discretion.

We were satisfied that the learned judge applied the right principles in the assessment of the sentence and correctly exercised his discretion. In the circumstances there were no grounds for us to intervene in the sentence imposed.

The appeal against the sentence was accordingly dismissed.